IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MARTIN SERRANO, Petitioner.	2 CA-CR 2007-0014-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR92-00570

Honorable Monica Stauffer, Judge

REVIEW GRANTED; RELIEF DENIED

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H O W A R D, Presiding Judge.

¶1 Following a July 1993 jury trial conducted in his absence, petitioner Martin Serrano was convicted of possession of marijuana for sale, transportation of marijuana for sale, and conspiracy to transport marijuana for sale. In February 2003, Serrano was sentenced to concurrent, aggravated prison terms totaling ten years. On appeal, we affirmed Serrano's convictions for transportation and conspiracy, vacated his conviction for possession, and affirmed his sentences with the modification that he must serve only two-

thirds, not eighty-five percent, of them before he is eligible for release. *State v. Serrano*, No. 2 CA-CR 2003-0081 (memorandum decision filed May 3, 2005). In 2006, Serrano filed a petition for post-conviction relief, pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., alleging ineffective assistance of trial counsel. The trial court summarily dismissed the petition, and this petition for review, in which Serrano asks that this matter be remanded for a new trial or for resentencing,[1] followed. We will not disturb a trial court's decision to grant or deny post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 We note with disapproval that the petition for review contains not one citation to the record to support the arguments made or the nearly five pages of facts in the petition, nor did Serrano cite the record in his petition for post-conviction relief. Rule 32.5 provides that "record citations . . . are required" in a post-conviction petition, and Rule 32.9(c)(1) provides that "the petition for review shall contain specific references to the record." With the exception of Serrano's affidavit, there is absolutely no support in the record for his arguments. Accordingly, we will disregard Serrano's statement of facts.

¶3 In addition, Serrano has quoted the trial court in the petition for review, but has failed not only to cite the record to support these quotations, but has also failed to include as part of the record on review the transcripts from which the quotations presumably were taken. "Where matters are not included in the record on appeal, the missing portions

[1]In his petition for post-conviction relief, Serrano asked that his sentences be vacated or that the trial court conduct an evidentiary hearing.

of the record will be presumed to support the action of the trial court." *State v. Caldwell*, 117 Ariz. 464, 468, 573 P.2d 864, 868 (1977); *see United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

¶4 Our memorandum decision on appeal set forth the following facts. Retained counsel, Charles Weninger, represented Serrano and two of his four codefendants (brothers Hector and Francisco Aguirre) at trial. In June 1993, several months after Serrano was arraigned, Weninger filed a discovery motion informing the trial court that, because of a potential conflict of interest related to a codefendant he did not represent, Serrano and Hector would seek substitute counsel. However, Weninger did not seek to withdraw his representation at that time or at the subsequent hearing to set a trial date. Following the trial court's denial on July 8 of his request for a continuance of the July 14 trial date, Weninger filed a motion to withdraw his representation of Serrano and Hector, which the trial court denied. Although Weninger avowed to the trial court that he had repeatedly explained his conflict of interest to Serrano and Hector and had instructed them to obtain separate counsel, the record is clear that they did not do so and that Weninger nonetheless continued to represent all three defendants. Weninger represented all three men at trial, none of whom appeared for trial, until the trial court declared a mistrial as to the Aguirre brothers and relieved Weninger from representing them. Serrano was arrested on federal drug charges in 1998 and was ultimately sentenced in this matter in February 2003.

¶5 Serrano raised on appeal the very issue now before us, whether his right to the effective assistance of counsel was violated by the trial court's denial of Weninger's motion

to withdraw his representation because of a conflict of interest. Although we did not address the claim of ineffective assistance of counsel because such claims must be brought in a post-conviction proceeding, *see* Rule 32.1; *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002), we nonetheless addressed whether the trial court had improperly denied Weninger's motion to withdraw.

¶6 Serrano's first two claims of ineffective assistance of counsel arise from the same issues he raised on appeal: whether Weninger's failure to seek timely withdrawal or to have Serrano sign a waiver of the conflict of interest constituted ineffective assistance of counsel, and whether the trial court denied Serrano his right to the effective assistance of counsel by denying Weninger's motion to withdraw. Because we found no merit to the underlying claim on appeal, we accordingly find the trial court did not abuse its discretion by dismissing it in the post-conviction proceeding.

¶7 As we noted on appeal, an attorney's joint representation of codefendants does not necessarily result in the denial of the effective assistance of counsel. *See State v. Martinez-Serna*, 166 Ariz. 423, 425, 803 P.2d 416, 418 (1990). Serrano's claims necessarily rest on a determination that an actual conflict of interest existed. *See State v. Jenkins*, 148 Ariz. 463, 466, 715 P.2d 716, 719 (1986) (to show denial of effective assistance of counsel based on attorney's joint representation of codefendants, defendant must show that counsel had actual conflict of interest and that conflict had adverse effect on counsel's performance). As we also noted on appeal, to prove an actual conflict of interest, a defendant must show "'some plausible alternative defense strategy or tactic might

have been pursued'" and "'the alternative defense was inherently in conflict with the attorney's other loyalties or interests.'" *Id*. at 466 n.1, 715 P.2d at 719 n.1, *quoting Brien v. United States*, 695 F.2d 10, 15 (1st Cir. 1982). Serrano has not suggested any strategy or tactic that Weninger might have asserted on Serrano's behalf if Weninger had not also represented the codefendants.

¶8 In addition, we rejected on appeal Serrano's claim that "'shifting the blame from Serrano to Hector Aguirre would have been a plausible trial strategy,'" finding instead that the evidence at trial showed "Serrano had not only actively participated in both the conspiracy and the transportation of the load of marijuana, but he had directed the operation. Thus, attempting to shift the blame from Serrano to Hector would not have been a plausible strategy, and no actual conflict [of interest] arose." We also rejected Serrano's complaint that joint representation had prejudiced him by precluding a potential plea offer, noting that "there was no possibility of a plea agreement once Serrano absconded early in the case" and that the state had asserted "it would not have extended a plea offer to Serrano" in any event. We likewise rejected Serrano's claim that the trial court should have granted Weninger's motion to withdraw because an attorney's representation of codefendants is fraught with an appearance of impropriety and concluded that the facts here did not rise to the level requiring reversal on this basis. *See State v. Davis*, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973) (trial court should give more weight to claim of conflict of interest by appointed counsel than by retained counsel). For all these reasons, we concluded that no actual conflict of interest existed, and we thus declined to address Serrano's claim that the

trial court had erred in finding he had waived any conflict of interest by failing to retain new counsel and absconding. For these same reasons, we conclude the trial court did not abuse its discretion in dismissing Serrano's claims of ineffective assistance of counsel.

¶9 Finally, Serrano contends Weninger was ineffective by telling him he "would not blame [Serrano] if [he] went to Mexico" without explaining the consequences of absconding. As the state argued in its response to the petition for post-conviction relief, Serrano does not claim in his affidavit that counsel advised him *not* to return for trial, only that he would not blame him if he went to Mexico. Moreover, in light of a minute entry of Serrano's arraignment dated December 28, 1992, which was part of the record on appeal and of which we take judicial notice, showing "the filing in Open Court of the original, executed Notice To Defendant Of Effect Of Voluntary Absence form . . . and a copy of the same was provided to Defendant Serrano," Serrano can hardly claim he was not informed of the consequences of absconding. We thus conclude the trial court did not abuse its discretion in dismissing this claim.

¶10 Although the petition for review is granted, relief is denied.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge